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In the Supreme Court of the United States

OCTOBER TERM, 1945

POPE & TALBOT, INC., a corporation,
Petitioner,

vs.

MATSON NAVIGATION COMPANY,
a corporation,
Respondent.

No. 247

Brief in Opposition to Petition for Writ of Certiorari

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The respondent, Matson Navigation Company, owner of the SS Maui, presents this, its brief, opposing the petition for certiorari herein.

I.

THE PETITION PRESENTS NO QUESTION OF LAW FOR REVIEW

The petition merely seeks a review of facts unanimously determined against the petitioner in the Court below.

There is no real issue of law presented, much less any "*important* question of maritime law", as asserted by petitioner. Such an issue cannot be created by the petitioner's assertion that the Circuit Court of Appeals herein has established as a rule of law that a privileged vessel may travel at any rate of speed she chooses. There is nothing in the opinion to warrant such an assertion.

The Circuit Court of Appeals in a full and well considered opinion, unanimously held that the speed of the Maui was not excessive under the existing circumstances and conditions, *after* having noted the following undisputed facts and rules:

1. "The facts show that the vessels sighted each other approximately five minutes before the collision. At that time they were more than a mile apart." (Opinion, R. 847.)[1]

2. "There was, then, ample opportunity for the taking of *any*[2] steps necessary to effect a safe passage." (Opinion, R. 847.)

3. The Maui and the Absaroka promptly on sighting "exchanged one-blast signals thereby entering into a passing agreement in accordance with the rules, an agreement that the Maui would cross the bow of the Absaroka and that the Absaroka would cross the stern of the Maui." (Opinion, R. 847.)

4. "In the face of her duty under the Inland and Pilot Rules and of her *whistle agreement* the Absaroka main-

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1. The Opinion appears in the Record, pp. 840-854 and is now reported in 149 F.2d (adv.) 295.

2. Emphasis supplied throughout this brief.

tained her speed at full ahead, nine knots, until at least two minutes before the collision, when her engines were stopped." (Opinion, R. 847-8.)

5. The Absaroka "maintained her course until approximately a half minute before the collision, when the wheel was put hard right and the engines reversed." (Opinion, R. 848.)

6. The Absaroka "still had headway at the time of the impact." (Opinion, R. 848.) "*She* struck the *forward* port side of the Maui at an angle from ahead of about 70° or 80°." (Opinion, R. 843-4.)

7. "The rules direct that a burdened vessel keep out of the way by directing her course to starboard so as to cross the stern of the other vessel or by slackening her speed, stopping or reversing. The Absaroka ignored their commands until too late to avoid disaster. She disregarded her duty as the burdened vessel and thereby violated Articles 19, 22 and 23 of the Inland Rules and Pilot Rule VII." (Opinion, R. 848.)

The case is a simple one, and the petition calls for reply only because of its effort to distort the holding of the Circuit Court with respect to the matter of the Maui's speed. The vessels sighted each other when they were over a mile apart. They were on crossing courses. By exchange of one-blast signals, they agreed that the Absaroka would pass under the stern of the Maui. The Absaroka flagrantly violated this undertaking and her statutory duty as the burdened vessel and thus brought about the collision. In response to the claim (the only one now urged) that the Maui's half speed of twelve knots was excessive, the Circuit Court held: (1) that such speed was not excessive or

in violation of any statutory rule and (2) that the speed of the Maui was not a proximate cause of the collision. Petitioner disputes neither of these conclusions, but in its frantic search for a point of law which may be attacked, asserts that the Circuit Court held that a privileged vessel is under no duty to proceed at reasonable speed. The opinion of the Circuit Court is not susceptible of any such interpretation.

Thus the petition and its brief ignore the facts stated above, ignore the opinion as a whole and attempt, by pulling three sentences from their context (Petition, pp. 6-7), to show that the Circuit Court of Appeals has established a rule that will lead vessels to travel at dangerous speeds. In effect, they are asking this Court to grant a writ to determine that a speed of 12 knots on San Francisco Bay is excessive as a matter of law even though the facts be that the "visibility was excellent"; that the vessels sighted each other when more than a mile apart with ample time to take any action to avoid collision; and that one-blast whistles were exchanged promptly by which the burdened vessel (Absaroka) agreed that she would keep out of the way of the privileged vessel (Maui).

Any such *fixed* rule on speed by reference to a certain number of knots would have to come from statutory enactment by the Congress or local legislative body.[3] There is no such rule for the waters in question which is not without significance that the dangers which petitioner attempts to conjure are non-existent.

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3. Petitioner apparently recognizes that local statute or ordinance could establish a fixed speed limit. See quotation, Brief, p. 19, from Farwell, The Rules of the Nautical Road, 238-239.

Petitioner is forced to rely on counsel's own statement that the Maui's speed was excessive. Piland, the assistant lighthouse keeper, who was a half mile or more from the collision, had only recently arrived in San Francisco and who some time before entering the lighthouse service may have stood at the helm of a Navy vessel, could scarcely be classified as an expert qualified to testify as to reasonable and safe speeds on San Francisco Bay. He even thought that there was a law against a privileged vessel maintaining course and speed (R. 201), yet petitioner's brief (p. 14) describes him as having been a "navigator" in a vain effort to give some value to his comment that the Maui's speed was "good" or that it was "fast."

Furthermore, and more noteworthy, there was not a single witness from the Absaroka who contended that the Maui's speed was excessive. As a matter of fact, Captain Prendle, the Absaroka's master contended that the Maui *stopped* her headway through the water (R. 242) and then "swept down in a sidewise motion * * *. She swooped on the Absaroka at a right angle." (R. 286.)[4]

Under the headings "Statement of Facts" and "Argument" in petitioner's brief an apparent effort is made to suggest questions that are not involved in the single issue of the Maui's speed, which issue the petitioner *expressly* states to be the *sole* issue under the petition. The "facts"

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4. That was his testimony in his deposition, although earlier and just two days after the collision he had testified before the C Marine Investigation Board that there was a *flood* tide at the time and that this flood tide set the Maui down on the Absaroka. (R. 253) This was either fabrication or gross ignorance since it was established that the tide was *ebbing* and not flooding. (R. 151) *At no time did he claim that the Maui's speed confused him or brought about the collision.*

narrated in the petitioner's brief give only a fragmentary and distorted picture of the case. Some are distinctly misleading. For example, petitioner (Brief, p. 13) states "the Absaroka had stopped her engines within about a minute of sighting the Maui." The fact is that the Absaroka did not stop her engines until a minute and a half before the collision, as shown by her engine room bell book. (Absaroka Exhibit 1, Johnson, R. 337, offered in evidence R. 217.) Since the vessels sighted each other when more than five minutes apart, this necessarily means that the Absaroka continued at full ahead for at least 3½ minutes after sighting the Maui and blowing one blast in reply to the Maui's one blast signal. This is quite different from the statement by the petitioner that the Absaroka stopped her engines within about a minute after sighting the Maui.

It is not appropriate here to burden the Court with a detailed statement of the facts of the case, since the controlling facts are fully set forth in the Opinion of the Circuit Court of Appeals. Petitioner has chosen to attach as an appendix to its brief the report of the assistant lighthouse keeper, which in no way controverts the essential facts of the case. It is interesting to note that this witness did not know that the Maui and the Absaroka had exchanged one-blast signals immediately after sighting each other and, accordingly, he did not know that the Absaroka had entered into a whistle agreement to keep clear. Furthermore, this report confirms the testimony of the other witnesses in stating "visibility was excellent. No fog or haze was seen for hours before or after the accident."

Petitioner makes no reference to the fact that the Absaroka's own log account of the collision is completely blind

on any of the facts. We attach as an appendix a columnar comparison of the log book account of the collision from the two vessels so that the Court may readily contrast the meaningless statement in the Absaroka's log with the full statement in the Maui's log.[5]

The Absaroka's log account left her master wide open to adopt any theory he might later have as to the cause of the collision. As noted above (footnote 4, p. 5), before the C Board he blamed a non-existent flood tide; in his deposition he discounted the tide and blamed the Maui *not* for her headway or speed but for *stopping* and moving sidewise on him; and now *counsel* claims that the Maui's half speed of 12 knots was excessive and the primary cause of the collision.

II.

THE MAUI'S SPEED WAS REASONABLE CASES CITED BY THE PETITIONER DISCUSSED

There is no basis for suggesting that a 12 knot vessel is a high speed vessel. The Maui's top speed was 16 knots at full ahead, but it is established that long before the vessels sighted each other the Maui was travelling at reduced speed, i.e., half speed on her engines, giving her a speed of about 12 knots. This obviously gave her a greater

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5. The Maui's log was written up by the mate on watch without assistance within a few hours after the collision while she was at anchor in the Bay and there was danger of her capsizing as a result of the collision damage. The Absaroka was in no danger and docked safely within two hours after the collision with ample opportunity to have prepared a full account of the collision and to have stated, if true, any of the faults later alleged against the Maui.

reserve of backing power and further demonstrates the reasonableness of her speed.

The Absaroka was travelling at her full speed of about 9 knots. We do not suggest that there was any fault of the Absaroka in thus going as fast as she could. Even though her speed had been much greater there was still no danger, *if* she had obeyed her duty as the burdened vessel and with even reasonable promptness turned to the right, stopped or reversed her engines. It was not the speed of either vessel at the time that they sighted each other and exchanged signals which caused the collision. It was the Absaroka's failure to take any action at all for at least 3½ minutes thereafter which was the sole cause of the collision.

If the Absaroka's master were in the predicament claimed in the petition and brief, then why did he immediately answer the Maui with one blast? If he felt that the Absaroka was in any way embarrassed by the tug with its tow or his prior exchange of signals with tug, then it would have been a simple thing for the Absaroka to have answered the Maui's one-blast signal with the danger signal of four or more short blasts. The Absaroka would thus have given some indication to the Maui of the Absaroka's intention not to pass under the stern of the Maui. The Maui was then well astern of the tug and tow, and there was ample opportunity for her to act under the special circumstances which would have been created by a danger signal from the Absaroka. Captain Heuer of the Maui testified as follows:

> "Q. Captain, approximately how far astern of the tug and tow was the Maui at the time you ex-

changed your first one-blast signals with the Absaroka?

A. About a quarter of a mile.

Q. At that time, Captain, if the Absaroka had, instead of answering your one-blast signal, blown four blasts, could you have taken any steps to have either gone to the right or gone astern and avoid the collision?

A. Yes." (R. 609.)

The Maui had no way of knowing that the Absaroka was going to violate her *agreed* duty until the secret intentions of the Absaroka to cross the bow of the tug had placed the Maui in the jaws of collision. The Absaroka was *signalling* her intention to do one thing and was actually doing another.

The statement appearing on page 24 of the petitioner's brief that "the Absaroka had the *right* (sic) to anticipate that she could pass the Maui and the tug *one at a time*" is quite amazing. The Absaroka was at all times to the *left* of the Maui. The tug was to the *right* of the Maui on a parallel course to the Maui and hence the tug's course line was more distant from the Absaroka than the Maui's course line. It would have been physically impossible for the Absaroka *first* to have crossed ahead of the tug and *then* to have passed under the stern of the Maui since she would already have crossed ahead of the Maui. If she expected to pass under the stern of the Maui *first* and *then* to cross ahead of the tug, such a maneuver would have been possible only if the Maui had been going at greater than her half speed.

Perhaps the Absaroka's master guessed that the Maui's speed was greater and gambled on a close shave to get

under the stern of the Maui and then to rush across the bow of the tug. Such a close shave gambling has been repeatedly condemned by the Courts. See *The Richmond* (D.C. Va.), 150 F. 193 at 194-5. In any event it is amazing that the petitioner urges that the Maui should have gone more slowly to permit the Absaroka to accomplish a maneuver which we see could have succeeded only if the Maui had been going *faster*.

The petitioner cites a total of six cases. One of these cases was a fog collision where the crossing signal rules do not apply;[6] one was a collision between a steamer and sailing vessel as to which the steamer was the burdened vessel and the steamer was held solely at fault;[7] three were crossing cases, in two[8] of which the burdened vessel was held solely at fault and in one[9] of which the

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6. *Pennsylvania, The v. Troop*, 19 Wall. 125, 86 U.S. 125, 22 L.Ed. 148. The quotation from this case in the petition is actually from an opinion of the Privy Council in The Europa. There is apparently no extant report of the opinion of the Privy Council although the report in the Admiralty Court below, 14 Jurist 627, shows that it was a fog collision where the responsible vessel was not condemned for *speed* as such but for her speed of 12½ knots in a dense fog without a special lookout and without sufficient power at her wheel to turn promptly. It has long been established in this country that even in fog cases there is no fixed speed but that the reasonableness of the speed must be determined by the facts of each particular case, such as extent of visibility, stopping ability and vigilance of lookout. *McCready v. Goldsmith*, 18 How. 89, 59 U.S. 89.

7. *City of Paris*, 9 Wall. 634, 76 U.S. 634.

8. *The Chicago*, 125 F. 712 (C.C.A. 2); *The Knoxville City*, 112 F.2d 223 (C.C.A. 9).

9. *Postal S.S. Corp. v. S.S. Isleo*, 308 U.S. 378. In this case the Court did not hold the privileged vessel at fault but merely upheld the validity of Pilot Rules II and VII in prohibiting cross signals. For the final decision on the merits see 112 F.2d 297. There was no cross signalling between the Maui and the Absaroka, hence the Maui had no advance notice that Absaroka would violate the rules.

privileged vessel was held jointly at fault, not for speed but for *continuance* of course and speed *after* the burdened vessel had blown two blasts indicating that she intended to cross ahead. The sixth case was not even an admiralty matter but involved a question of punitive damages for setting a fire on a windy day on a railroad.[10]

The petitioner contends that an important question of maritime law is involved. However, the petitioner has not quoted from a single case even suggesting that any such problem exists, either as a matter of law or practical navigation, under the rules of the road, rules which have been in force in substantially their present form for approximately half a century. Surely the innumerable reported collision cases would have discussed this problem if it existed. Surely, also, some text writer would have discovered it. Petitioner's brief (pp. 16, 19) quotes at some length from the most recent textbook on collision law, Farwell, The Rules of the Nautical Road, but the petitioner's "question" is not covered.

We submit that the petitioner's "question" is not considered in any case or in any text because it has no basis. No one apparently has, heretofore, had the temerity to urge that there is an important and undecided question of law presented in a decision such as the instant one; a decision which holds that the glaring faults of the burdened vessel are adequate to account for the collision and which refuses to shift any part of the responsibility to the privileged vessel for a speed of only three knots more than the burdened vessel where the vessels sighted and sig-

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10. *Anderson v. Atlantic Coast Line R. Co.*, 179 S.C. 367, 184 S.E. 164, 104 A.L.R. 406.

nalled a safe distance apart with ample opportunity for the burdened vessel to obey her agreed duty.

Petitioner's argument in effect is that the speed of the privileged vessel in a crossing situation will be excessive wherever by hindsight it can be said that if she had been going more slowly the collision would not have occurred, in other words, that the Absaroka might have been able to get away with crossing the Maui's bow in violation of the rules and her whistle agreement. This argument has been rejected by the Courts.

In *The Fred B. Dalzell, Jr.* (C.C.A. 2), 45 F.2d 580, which involved crossing vessels in New York Harbor, the burdened vessel, the Moran, was held solely at fault for failure to keep clear. The privileged Dalzell was going 11 knots, but in refusing to hold her speed excessive the Court said:

> "Some suggestion has been made that, had her speed been less, she would have had time to stop, even after the Moran signalled, and allow her to clear. This is doubtless so. *But she was certainly under no duty to so regulate her speed that she could stop in safety for the Moran to pass ahead whenever and however late that burdened vessel saw fit to notify her that she was about to risk collision in so doing in violation of the starboard hand rule.* See *The Chicago* (C.C.A.) 125 F. 712, 716. We see no justification for the charge that the Dalzell tug stubbornly held on into collision, however well that does characterize the conduct of the Moran. The latter tug's insistence upon crossing ahead when she should have gone behind wrongfully put both vessels into positions where danger of collision was imminent. In the absence of clear proof that the privileged vessel,

then acting in extremis, was at fault in failing to avert the collision in spite of the conduct of the wrongdoer, we think the vessel which took the chance, violated the rule, and created the danger, is wholly responsible for the result." (p. 581)

The Absaroka's fault is even more aggravated than the burdened vessel in the above case which had blown two blasts to the privileged vessel, indicating that she would attempt to cross the privileged vessel's bow. The Absaroka misled the Maui by repeatedly blowing one blast, leaving it for the Maui to divine the Absaroka's contrary intention.

In the case of *The Lexington* (C.C.A. 2), 275 F. 279, involving crossing vessels at night in the waters of Narragansett Bay, the burdened vessel was held solely at fault for failure to avoid crossing the privileged vessel's bow. *The privileged vessel was making a speed of 14 to 15 miles per hour.* Apparently there was no argument that the speed of the privileged vessel was excessive, since the vessels sighted each other when about a mile apart and there was ample opportunity for the burdened vessel to keep clear, just as there was for the Absaroka in the instant case.

CONCLUSION

The whole case is one of flagrant fault of the Absaroka as the burdened vessel which wholly failed in her statutory duty to keep out of the way of the Maui. The unanimous decision of the Circuit Court of Appeals is without error. There is no issue of law involved which calls for any review by this Honorable Court. The petition is without merit and should be denied.

Respectfully submitted,

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(APPENDIX FOLLOWS)